UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
THE MORGAN GROUP, INC.,	)	CASE NO. 02-36046 HCD
MORGAN DRIVE AWAY, INC., and	)	CHAPTER 11
TDI, INC.,	)	
DEBTORS.	)	
	)	
	)	
LANDSTAR LOGISTICS, INC., and	)	
TRANSLINK, INC.,	)	
PLAINTIFFS,	)	
vs.	)	PROC. NO. 04-3101
	)	
LIBERTY MUTUAL INSURANCE COMPANY,	)	
MORGAN DRIVE AWAY, INC., VICTOR	)	
GARDNER and SHARON GARDNER,	)	
DEFENDANTS.	)	

Appearances:

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E. Lee Morris, Esq., James E. McGee, Esq., and William J. Moore, Esq., counsel for defendant Liberty Mutual Insurance Co., Munsch Hardt Kopf & Harr, P.C., 4000 Fountain Place, 1445 Ross Avenue, Dallas, Texas 75202-2790;

Irving M. Rosenberg, Esq., counsel for Victor and Sharon Gardner, Hesch, Rosenberg, Roberts, & Sherry, LLC, 420 Lincolnway West, Mishawaka, Indiana 46544;

James E. Rossow, Jr., Esq., and John M. Rogers, Esq., counsel for defendants Victor and Sharon Gardner, Rubin & Levin, P.C., 500 Marott Center, 342 Massachusetts Avenue, Indianapolis, Indiana 46204-2161; and

Michael P. O'Neil, Esq., Andrew T. Kight, Esq., and Steven H. Ancel, Esq., counsel for defendant Morgan Drive Away, Inc., Sommer Barnard, PC, One Indiana Square, Suite 3500, Indianapolis, Indiana 46204-2023.

MEMORANDUM OF DECISION

At South Bend, Indiana, on September 27, 2005.

Before the court is the Plaintiffs' Motion to Alter or Amend Judgment, filed by the plaintiffs Landstar Logistics, Inc. ("Landstar") and Translink, Inc. ("Translink") (together, "plaintiffs"), on April 11, 2005.[1] The plaintiffs brought the Motion pursuant to Federal Rule of Civil Procedure 59(e), claiming that the court's Memorandum of Decision of March 30, 2005 contained manifest errors of law. Defendants Morgan Drive Away, Inc. and Liberty Mutual Insurance Company ("defendants") filed Responses to the Plaintiffs' Motion, and the plaintiffs filed a reply brief. For the reasons that follow, the court denies Plaintiffs' Motion to Alter or Amend Judgment.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(A) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

When the court granted the defendants' Motion to Dismiss, before it were that Motion, the plaintiffs' Complaint for Declaratory Judgment, and three documents attached to the Complaint: Exhibit A, the

[1] Landstar stated in its Reply Brief that Translink had settled its claims against the defendants to the adversary proceeding and that Landstar is now the sole movant. *See* R. 49. However, because the pleading and documents before the court were filed by the plaintiffs jointly, the court will continue to refer to the movant as "plaintiffs."

"Transportation Brokerage Contract" ("Contract"); Exhibit B, the state court complaint filed in Charleston, South Carolina ("state court complaint"); and Exhibit C, the insurance policy between Liberty Mutual Insurance Company and Morgan Drive-Away, Inc. ("Liberty Policy"). The plaintiffs asked this court to declare that, under the Contract, the defendant Morgan Drive Away ("Morgan") expressly agreed to indemnify the plaintiffs fully, that Morgan and its insurer Liberty Mutual were obligated to indemnify the plaintiffs, and that the plaintiffs were covered under the Liberty Policy. They stated that their general inquiry was "whether the Plaintiffs have stated any possible claim for insurance coverage pursuant to the Brokerage Agreement, as alleged in the Plaintiffs' Complaint." R. 32 at 2.

The court examined the four corners of the Contract and the Liberty Policy and considered the state court complaint in order to determine whether it could make the sought declarations. It accepted the plaintiffs' allegations in their Complaint to be true. It concluded that it could not declare that the Contract by its terms required the defendants to indemnify the plaintiffs – because the Contract was illegible and unsigned, because neither plaintiff was a party to the Contract, and because it was not clear that the proffered Brokerage Contract was the final Contract. After reviewing the provisions of the Liberty Policy, the court concluded that it could not "declare the rights and legal relations of these plaintiffs seeking declaratory judgment based upon the Contract and Liberty Policy appended to their Complaint." R. 38, Mem. of Dec., at 13. On March 30, 2005, the court granted the Defendants' Motion to Dismiss for failure to state a claim.

Discussion

The Plaintiffs' Motion to Alter or Amend Judgment was filed within ten days after entry of the Court's Order dismissing the plaintiffs' Complaint. *See* Fed. R. Bankr. P. 9023; Fed. R. Civ. P. 59(e) ("Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment."); *see also In re DeLaughter*, 295 B.R. 317, 319 (Bankr. N.D. Ind. 2003).

> Although both Rules 59(e) and 60(b) have similar goals of erasing the finality of a judgment and permitting further proceedings, Rule 59(e) generally requires a lower threshold of proof than does Rule 60(b). Instead of the exceptional circumstances required to prevail under Rule 60(b), Rule 59(e) requires that the moving party clearly establish a manifest error of law or an intervening change in the controlling law or present newly discovered evidence.

Romo v. Gulf Stream Coach, Inc., 250 F.3d 1119, 1121 n.3 (7th Cir. 2001) (citations omitted). The Seventh Circuit Court of Appeals has defined "manifest error" as a court's "'wholesale disregard, misapplication, or failure to recognize controlling precedent.'" *Oto v. Metropolitan Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir.2000), *cert. denied*, 531 U.S. 1152 (2001) (quoting *Sedrak v. Callahan*, 987 F.Supp. 1063, 1069 (N.D.Ill.1997)).

> [Rule 59(e)] "does not provide a vehicle for a party to undo its own procedural failures, and it certainly does not allow a party to introduce new evidence or advance arguments that could and should have been presented to the district court prior to the judgment."

Bordelon v. Chicago Sch. Reform Bd. of Trustees, 233 F.3d 524, 529 (7th Cir.2000) (quoting *Moro v. Shell Oil Co.*, 91 F.3d 872, 876 (7th Cir.1996)). The burden is on the party seeking reconsideration to demonstrate the existence of manifest errors of fact or law. *See In re Nosker*, 267 B.R. 555, 565 (Bankr. S.D. Ohio 2001); *cf. Lekas v. Briley*, 405 F.3d 602, 615 n.8 (7th Cir. 2005).

The plaintiffs first argued that the court's judgment worked a "manifest injustice," rather than a "manifest error of law," against the plaintiffs. R. 41 at 2. They pointed out that they could have filed an amended complaint as a matter of course pursuant to Federal Rule of Civil Procedure 15(a). The court cut off their right to amend, they asserted, by entering a final judgment against them. As a result, they were required to file a motion to set aside the judgment.

The court suggested in its Memorandum of Decision that it had anticipated and awaited a request for leave to amend the pleading. *See* R. 38 at 9, n.5. The plaintiffs, however, apparently decided not to address the defendants' reasons for dismissal by amending their Complaint. In their brief, the plaintiffs explained that, if they had "merely filed their amended complaint to allege the corporate history of Landstar or the agency relationship between the plaintiffs," they would not have been able to amend later as of right. R. 41at 7. In the view of the court, the plaintiffs had ample time, opportunity, and reason to amend their Complaint, but chose not to do so.

They may not have another opportunity now to try to get it right by presenting evidence that should and could have been raised earlier. *See, e.g.*, *Bordelon,* 233 F.3d at 529 (noting that Bordelon never sought leave to amend his 12(N) statement and suggested an amendment only in his Rule 59(e) motion; concluding that "the district court was within its discretion in refusing to allow Bordelon to use Rule 59(e) to 'undo' the shortcomings of his Local Rule 12(N) statement"). A motion seeking reconsideration of the court's determination is not to be used to present evidence that could have been adduced earlier. *See LB Credit Corp. v. Resolution Trust Corp*., 49 F.3d 1263, 1267 (7th Cir. 1995) (stating the principle that "motion to alter or amend a judgment is not appropriately used to advance arguments or theories that could and should have been made before the district court rendered a judgment or to present evidence that was available earlier"); *Bally Export Corp. v. Balicar, Ltd.*, 804 F.2d 398, 404 (7th Cir. 1986) (stating that "a motion for reconsideration is an improper vehicle to introduce evidence previously available"); *In re Crozier Bros., Inc.*, 60 B.R. 683, 689 (Bankr. S.D.N.Y. 1986) ("A party who failed to prove his strongest case is not entitled to a second opportunity by moving to amend.") (citation omitted).

The plaintiffs also argued that manifest errors of law existed in the court's decision. They asserted that the court erred in making "findings of fact" at the pleadings stage, without the benefit of discovery. According to the plaintiffs, the court erred in "finding" that the Contract was illegible and unsigned and that Landstar and Translink were not parties to the Contract. The plaintiffs insisted that the court could not find facts but must accept as true all the plaintiffs' well-pleaded facts. *See* R. 41 at 6. They relied on *International Marketing, Ltd. v. Archer-Daniels-Midland Co., Inc.*, 192 F.3d 724 (7th Cir. 1999), which noted that "it is a truism that fact-finding has no part in resolving a Rule 12(b)(6) motion." *Id.* at 730 (quoting *Johnson v. Revenue Mgmt. Corp.*, 169 F.3d 1057, 1059 (7th Cir. 1999)).

It is a bedrock principle that a court, when asked to dismiss a complaint, generally should consider only the allegations contained within that complaint. It may also consider the terms of attached written instruments which are exhibits to the pleading. *See* Fed. R. Civ. P. 10(c) ("A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes"); *Centers v. Centennial Mtg., Inc.*, 398 F.3d

930, 933 (7th Cir. 2005); *Rosenblum v. Travelbyus.com Ltd.*, 299 F.3d 657, 661 (7th Cir. 2002). However, it is also "a well-settled rule that when a written instrument contradicts allegations in the complaint to which it is attached, the exhibit trumps the allegations." *Northern Indiana Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F. 3d 449, 454 (7th Cir. 1998) (citing cases); *see also Centers*, 398 F.3d at 933 ("And while we accept well-pleaded allegations as true and draw all reasonable inferences in favor of the plaintiff, to the extent that the terms of an attached contract conflict with the allegations of the complaint, the contract controls.").

> "The court is not bound to accept the pleader's allegations as to the effect of the exhibit, but can independently examine the document and form its own conclusions as to the proper construction and meaning to be given the material."

Rosenblum, 299 F.3d at 661 (quoting 5 Wright & Miller, *Federal Practice & Procedure: Civil 2d*, § 1327 at 766 (1990)). Sometimes, the attached documents themselves lead to the dismissal of the plaintiffs' claims. *See Thompson v. Illinois Dept. of Prof'l Regulation*, 300 F.3d 750, 759 (7th Cir. 2002) (affirming the dismissal, holding that the plaintiff "attached a document to his pleadings which showed he was not entitled to relief").

The Seventh Circuit Court of Appeals drew a crucial distinction between fact-finding and independent examination of a document in *International Marketing, Ltd.*, the case on which the plaintiffs relied. The appellate court commented that it would have been improper to identify the parties' intent at this early stage of the proceedings, since that would require "fact-finding, a judicial function that has no place at this early stage in the proceedings." *Id.*, 192 F.3d at 730. The court continued:

> While it is a truism that fact-finding has no part in resolving a Rule 12(b)(6) motion, *Johnson v. Revenue Management Corp*., 169 F.3d 1057, 1059 (7th Cir.1999), that is not what the district court did. Instead, the court simply took [the plaintiff] IML's complaint at face value, as it was required to do. IML made no allegation to counter the plain language of its written contracts with Swift, which IML itself attached to the complaint. Those contracts evidenced integration on their face.

Id. The appellate court was satisfied that the district court had restricted itself to legal rather than factual analysis of the contract and had not rested on impermissible fact-finding. *See id.* In *Centers*, the district court also independently examined the attached agreements and determined their meanings. The court of appeals reviewed its examination of the documents. It upheld the district court's conclusions in part and reversed in part. *See*

Centers, 398 F.3d at 935. According to the appellate court, because the plaintiff's claims concerning the parties' obligations were based on an assignment agreement and stock purchase agreement, the court was required to "find support for his claims, if anywhere, in the attached documents." *Id.* at 936. The appellate court did not find such an obligation in those documents. For that reason, "plaintiff's request for a declaration and mandatory injunction to that effect were properly dismissed." *Id.*

In this case, the court has reviewed its Judgment and Memorandum of Decision to determine whether it applied the appropriate standards on a Rule 12(b)(6) motion to dismiss. It is satisfied that it accepted the Complaint and the attached documents at face value. To the extent that it could determine that the attached Contract conflicted with the allegations of the Complaint, it concluded that the Contract controlled. *See Centers*, 398 F.3d at 933. After noting the illegibility of the Contract and its missing signature (which are undisputed as judicially noticed facts), it pointed out that neither plaintiff was identified as a party to the Contract (also undisputed judicially noticed facts). Because the court could not find support for the plaintiffs' claims in the attached Contract, it recognized that there was no principled way to declare the indemnification obligations under that Contract. Accordingly, it determined that the plaintiffs had failed to state a claim against the defendants based upon the Contract.

Nothing that the plaintiffs have asserted in their Motion to Alter or Amend changes that determination. The plaintiffs now claim that they can explain the discrepancies and want the opportunity to make those proofs now. However, "'a plaintiff may plead himself out of court by attaching documents to the complaint that indicate that he or she is not entitled to judgment.'" *Centers*, 398 F.3d at 933 (quoting *Ogden Martin Sys. of Indianapolis, Inc. v. Whiting Corp.*, 179 F.3d 523, 529 (7th Cir. 1999) (quoting *In re Wade*, 969 F.2d 241, 249 (7th Cir. 1992)). In this case, the court determines again, the plaintiffs are not entitled to a declaratory judgment based upon the attached documents.

The court also reaffirms its original decision not to rely upon the state court complaint attached as Exhibit B to the plaintiffs' Complaint. The plaintiffs offered it because it alleges the agency relationship between

Landstar and Translink. The court was not required, under Rule 10(c), to adopt the exhibit as a truthful statement, simply because it was attached to the Complaint to support an alleged fact in the pleading. In the view of the court, the document was attached for a self-serving purpose: It was a unilateral writing, not a negotiated contract, attached to present further argument rather than to establish a truth. *See Northern Indiana Gun & Outdoor Shows*, 163 F.3d at 455 ("Rather than accepting every word in a unilateral writing by a defendant and attached by a plaintiff to a complaint as true, it is necessary to consider why a plaintiff attached the documents, who authored the documents, and the reliability of the documents.").

Moreover, the court, upon reconsideration of its dismissal of the plaintiffs' Complaint, again finds that the defendants met their initial burden of demonstrating the legal insufficiency of the Complaint based upon the attached documents. The plaintiffs were required, at that point, to respond with facts sufficient to withstand the motion to dismiss. *See, e.g., Lee v. City of Chicago*, 330 F.3d 456, 459 (7th Cir. 2003). Because they did not so respond, the court dismissed their Complaint. Now, in their brief supporting the Motion to Alter or Amend, the plaintiffs append numerous documents as evidence that, they tell the court, could support the allegations in an amended complaint (which is also appended, in draft form). *See* R. 41, exhibits. For example, they have proffered affidavit evidence establishing, they claim, the successor relationship between Landstar and Landstar ITCO, the agency relationship between the plaintiffs, and the contract in effect between the parties. *See* R. 41 at 8 n.5; *see also* Affidavit of Priscilla Miller.[2] Because the plaintiffs had submitted to this court two Contracts allegedly between Landstar Logistics, Inc. and Morgan Drive Away, Inc. (one dated February 1, 1996, and another dated May 21, 1996), the court was anxious to learn which contract was actually in effect during the crucial time of the Gardners' accident. The plaintiffs admitted in their brief that "there were apparently two versions of the Contract, one of which was submitted in error in support of an earlier motion." R.41 at 13.

[2] The "Affidavit of Priscilla Miller" is a three-page document following the "Draft Amended Complaint for Declaratory Judgment." They are appended as exhibits to the Brief in Support of Plaintiffs' Motion to Alter or Amend Judgment. The Draft Amended Complaint was labeled "Exhibit 1," but the Affidavit was not labeled as an exhibit. However, the Affidavit has attached its own exhibits, which are clearly marked A, B, and C.

According to Priscilla Miller's Affidavit, the February 1, 1996 Contract was submitted in error. The court surmised, therefore, that the May 21, 1996 Contract was the one in effect.

Priscilla Miller, the Controller of Landstar Logistics and the custodian of corporate documents, stated in her Affidavit that she recently had located a blank form of "the contract between Landstar Logistics, f/k/a/ Landstar ITCO, Inc. and Morgan Drive Away," which was "the contract signed on March 16, 2001." *See* R. 41, "Affidavit of Priscilla Miller," ¶¶ 4, 7. According to the Affidavit, that Transportation Brokerage Contract attached as Exhibit B was "in full force and effect on March 16, 2001, the date of the accident which is the subject matter of the *Gardner v. Cardinal* matter." She further stated that the February 1, 1996 Contract "was not the contract in effect between the parties." *Id.* at ¶ 4.

The Court finds that this Affidavit simply adds fuel to the fire. Prior to the submission of the Affidavit of Ms. Miller, the court had before it two different Brokerage Contracts as attachments to Plaintiffs' Motions – dated May 21, 1996 and February 1, 1996. In its Memorandum of Decision, the court stated:

> The plaintiffs, nonsignatories to the Contract, have submitted two different Contracts to the court, each illegible and unsigned, each purported to be <u>the</u> "Transportation Brokerage Contract" demonstrating that the debtor is the contract indemnitor of the plaintiffs, and have asked the court to declare that they were indemnified by the Contract's provisions. The court determines that it cannot declare that the Contract attached to the plaintiffs' Complaint by its terms requires Morgan to indemnify the plaintiffs or hold them harmless.

R. 38 at 11. Ms. Miller now tells the court that the February 1, 1996 Contract *was not* in effect but that a contract signed on March 16, 2001 *was* "in full force and effect." She offers the court a "blank form of the contract signed on March 16, 2001" as her Exhibit C. However, there is no exhibit of the contract that was <u>signed</u> on March 16, 2001, and the Contract attached as Exhibit B is dated May 21, 1996, not March 16, 2001. Without commenting on the record-keeping practices of this plaintiff, the court makes two observations. First, it finds that the Affidavit of Priscilla Miller provides no clarity concerning the controlling contract between the parties. In fact, with this Affidavit the court might be persuaded that the May 21, 1996 Contract on which the Plaintiffs relied in their request for declaratory relief was not the operative Contract in effect during the time period for which the

plaintiffs seek liability coverage. Second, the court notes that the blank contract – Exhibit C, which Ms. Miller states was the contract signed on March 16, 2001, "the date of the accident which is the subject matter of the *Gardner v. Cardinal* matter" – is entitled "LANDSTAR ITCO, INC.," and includes, on the signature line of the agreement, the title "Landstar ITCO," not "Landstar Logistics." However, according to Ms. Miller's Exhibit A, "Landstar ITCO" merged into Landstar Logistics "under the name of 'Landstar Logistics, Inc.'" on December 30, 1996. *See* Affidavit, Ex. A, Certificate of Secretary of State of Delaware. Apparently the company still was using the contracts of Landstar ITCO five years after the merger.

The court has considered the plaintiffs' arguments, along with the attached documents, and is not persuaded that there are errors to be corrected in its dismissal of the plaintiffs' Complaint. Nor have the plaintiffs demonstrated that the court should not have dismissed the Complaint with prejudice. Dismissal is governed by Rule 41 of the Federal Rules of Civil Procedure. A plaintiff may dismiss a case voluntarily under Rule 41(a), and that dismissal is assumed to be without prejudice, unless the order of the court states otherwise. *See Moser v. Universal Engineering Corp.*, 11 F.3d 720, 723 and n.5 (7th Cir. 1994). Upon motion by a defendant, however, the court may involuntarily dismiss a case. Generally speaking, dismissal under Rule 41(b) is presumed to be an adjudication upon the merits and thus the involuntary dismissal is with prejudice. *See id.* In this case, the defendants sought dismissal, and the ground of dismissal was not listed as one of the exceptions under Rule 41(b). The plaintiffs did not request the court to consider dismissal without prejudice and did not offer to pay the defendants' expenses. *See Babcock v. McDaniel*, 148 F.3d 797, 799 (7th Cir. 1998) ("Dismissals *without* prejudice are usually granted only if the plaintiff pays expenses incurred by the defendant in defending the suit up to that point.") (citing *Marlow v. Winston & Strawn*, 19 F.3d 300, 305 (7th Cir. 1994)). In the court's view, dismissal with prejudice was proper and appropriate.

After reviewing the court's Memorandum of Decision and Judgment of March 30, 2005, for manifest errors of law, it again "concludes that the plaintiffs can prove no set of facts arising from the illegible, incomplete Contract in support of their indemnity claim which would entitle them to relief." R. 38, Mem. of Dec. at 11-12; *see also Thompson v. Illinois Dept. of Prof'l Regulation*, 300 F.3d 750, 754 (7th Cir. 2002) ("The fact remains

that where a plaintiff attaches documents and relies upon the documents to form the basis for a claim or part of a claim, dismissal is appropriate if the document negates the claim."). The court therefore denies the Plaintiffs' Motion.

Conclusion

For the reasons presented above, the court denies the Plaintiffs' Motion to Alter or Amend Judgment originally filed by the plaintiffs Landstar Logistics and Translink, Inc., but now brought by the sole movant Landstar Logistics, Inc.

SO ORDERED.

/s/ Harry C, Dees, Jr.
Harry C. Dees, Jr., Chief Judge
United States Bankruptcy Court